Supreme Court, U.S.
FILED

No. 951060 AUG 14 1995

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In The Supreme Court Of The United States

OCTOBER TERM, 1995

LEON SALB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Does the Appellate Court satisfy the requirements of a meaningful review when, in determining whether a defendant has not been denied his Sixth Amendment right to effective assistance of counsel, the Appellate Court limits the review to only whether or not the complained of acts were a part of "trial strategy" under only the first part of the standard set out in ***Strickland v. Washington***, 466 U.S. 668 (1984), rather than focusing on the specific acts and/or omissions under the standard set out in ***United States v. Cronic***, 466 U.S. 648, 658 (1984), where the facts demonstrate extrinsic ineffectiveness.

PARTIES BELOW

Petitioner, LEON SALB, *Defendant-Appellant.*

Respondent, UNITED STATES OF AMERICA, *Plaintiff-Appellee.*

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

LEON SALB,
Petitioner,

vs.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

There are no other reports of opinions delivered in this case other than the Third Circuit Opinion which can be found in the Appendix at A1.

JURISDICTION

The Memorandum Opinion, of the United States Court of Appeals for the Third Circuit, filed May 12, 1995, and the denial of the Suggestion for Rehearing filed on June 13, 1995.

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1). The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

In pertinent part, the Sixth Amendment to the Constitution of the United States, recites:

> *"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."*

STATEMENT OF THE CASE

On February 5, 1991, a federal grand jury, sitting in the Western District of Pennsylvania, returned a single-count Indictment against Petitioner. The Indictment charged that from in or around 1978, and continuing thereafter to on or about August, 1988, Petitioner conspired to possess with the intent to distribute in excess of five (5) kilograms of cocaine, in violation of Title 21 U.S.C. §§ 846 and 841(a)(1).

The government's court-ordered Bill of Particulars identified sixteen individuals with whom Petitioner allegedly conspired with in the charged conspiracy.

Petitioner entered a plea of not guilty, and on August 19, 1991, the trial began. Prior to, and during, the trial, Petitioner moved to dismiss the indictment, or in the alternative, to limit the government's proof, based on his contention that the proof at trial would establish multiple conspiracies instead of the single conspiracy as charged by the government. These various motions were all denied by the district court.

During the trial, Petitioner's trial counsel admitted Petitioner's involvement in cocaine trafficking in both the opening and closing statements, arguing only the material variance between the government's charge and its anticipated proof at trial as a basis for acquittal. In his opening argument, Trial Counsel stated that:

> *"the tentacles of the conspiracy you are going to find reach themselves to Illinois and to the Western District of Pennsylvania . . ."*

With the admission that the charged conspiracy was to have included Illinois, Trial Counsel, in his closing argument to the jury, trial counsel stated the following:

> *"I think the government put on a pretty compelling case that my client was involved in Chicago. I will admit that it looks like my client probably did it in Chicago...The absolute hardest thing in the world to do at this point in time will be to find my client not guilty...And if they want to try him in Chicago, then I presume he will probably get convicted and go to jail forever . . . Hardest thing in the world for me is to ever, in a million years, win this case."*

On the last day of the trial, Petitioner failed to appear. At the close of the case, the jury returned a verdict finding Petitioner guilty as charged.

Prior to sentencing, Petitioner was apprehended, and a second Indictment was returned, charging him with failure to appear in violation of Title 18 U.S.C. § 3146(a)(1). Sentencing in this matter was held on April 1, 1992. Regarding the conspiracy conviction, the district court found the applicable guideline range to be 292 to 365 months and, due to the amount of drugs involved and Petitioner's flight, the district court imposed a sentence of 365 months. The district court also imposed a consecutive 18-month sentence for the flight conviction.

Petitioner filed a timely Notice of Appeal from his conviction and sentence. An appeal was filed in the Third Circuit, in which Petitioner's conviction and sentence was affirmed.

Petitioner then filed a Motion to Vacate Judgment Conviction and Sentence pursuant to Title 28 U.S.C. § 2255, claiming ineffective assistance of counsel for the statements made during the closing arguments. On July 13, 1994, Petitioner's motion was denied by Judge Maurice B. Cohill, Jr., United States District Court Judge for the Western District of Pennsylvania. Subsequently, Petitioner filed an appeal with the Third Circuit, arguing the district court's denial of the § 2255 Motion.

The Third Circuit, in a decision filed May 12, 1995, affirmed the district court's denial of the § 2255 Motion. The Third Circuit found that the statements complained of were in furtherance of trial counsel's strategy and, thereby, failed to meet the standards of ineffective assistance of counsel. In so doing, the Third Circuit totally failed to consider the standard set out in ***United States v. Cronic***, 466 U.S. 648 (1984). Petitioner then filed a Petition for Rehearing with the Third Circuit. Said petition was denied by the Third Circuit on June 13, 1995.

It is from the above-referenced decisions of the Third Circuit that Petitioner now brings this Writ of Certiorari.

ARGUMENT

A. The United States Court of Appeals for the Third Circuit has rendered a decision in conflict with the decisions of other United States courts of appeals on the same matter; and has decided a federal question in a way that conflicts with applicable decisions of this Court.

The United States Court of Appeals for the Third Circuit has rendered a decision that conflicts with the decisions of the cases below in dealing with a claim of ineffective assistance of counsel. On the issue of determining ineffective assistance of counsel, particularly extrinsic ineffectiveness:

(1) United States Supreme Court (1984): ***Strickland v. Washington***, 466 U.S. 668;

(2) United States Supreme Court (1984): ***United States v. Cronic***, 466 U.S. 648;

(3) 9th Circuit (1991): ***United States v. Swanson***, 943 F.2d 1070;

(4) 11th Circuit (1989): ***Harding v. Davis***, 878 F.2d 1341;

(5) 4th Circuit (1989): ***Brown v. Dixon***, 891 F.2d 490;

(6) 6th Circuit (1984): ***Martin v. Rose***, 744 F.2d 1245.

(7) 6th Circuit (1981): ***Wiley v. Sowders***, 647 F.2d 642.

In the present case, the Third Circuit is said to have considered Trial Counsel's performance as a whole. However, the Third Circuit failed to address the problems in the opening statement but, rather, put its entire focus on the statements made in the closing arguments. As stated above, these statements included the following:

> *"I think the government put on a pretty compelling case that my client was involved in Chicago. I will admit that it looks like my client probably did it in Chicago...The absolute hardest thing in the world to do at this point in time will be to find my client not guilty...And if they want to try him in Chicago, then I presume he will probably get convicted and go to jail forever . . . Hardest thing in the world for me is to ever, in a million years, win this case."*

In reviewing the district court's denial of relief under the § 2255 Motion, the Third Circuit stated that the essence of government's case against Petitioner was that Petitioner *"was involved in a drug conspiracy which extended from Pennsylvania to Chicago and elsewhere. However, there was little evidence of Salb's actual involvement in any transactions in Pennsylvania. The majority of the government's conspiracy case against Salb concerned drug activity in and around Chicago"*. [Appellate Decision: p.5](emphasis supplied).

The Third Circuit, viewing Trial Counsel's performance as a whole, stated that Trial Counsel "designed a strategy" against the government's case, which was to show the existence of multiple conspiracies rather than the single conspiracy charged

in the Indictment. This was the entire extent of the Third Circuit's analysis as to Petitioner's claim of ineffective assistance of counsel.

In making this determination, the Third Circuit, having two different standards to choose from, erroneously applied the standard for ineffectiveness of counsel as established in ***Strickland v. Washington***, 466 U.S. 668 (1984), rather than the more appropriate standard set out in ***United States v. Cronic***, 466 U.S. 648, 658 (1984).

By limiting its review of the issue, the Third Circuit simply looked to see if the statement of Petitioner's counsel could be tied into a reasonable defense strategy, and nothing more. In utilizing such a one dimensional approach, the Third Circuit failed to conduct an adequate review of the issue under either ***Strickland*** or ***Cronic***. Such a practice allows potentially egregious errors by counsel to be passed over and, thereby, undermines the nature and purpose of the standards for reviewing ineffective assistance claims.

According to ***United States v. Swanson***, 943 F.2d 1070, 1073 (9th Cir. 1991), the ***Strickland*** test, requiring a showing of prejudice caused by the counsel's ineffectiveness, is applicable (1) in cases where the record reflects that an attorney's errors or omissions occurred during an inept attempt to present a defense, or (2) that he or she engaged in an unsuccessful tactical maneuver that was intended to assist the defendant in obtaining a favorable ruling.

The statements which admitted Petitioner's guilt in illegal activities in Chicago were totally improper, given the fact that the government's case had Petitioner being involved in Chicago as well as in Pennsylvania. Regardless of what trial counsel was attempting to do, the fact is that such admissions of guilt

took away from the jury any doubt as to Petitioner's guilt, thereby sealing Petitioner's conviction. As such, such an unsuccessful tactic was worthy of further inquiry as to the potential prejudice it caused in the outcome of the trial. By not inquiring any further, the Third Circuit failed to adhere to follow ***Strickland***.

In ***Cronic***, the Supreme Court made it clear that there were certain situations which would warrant an exception to the ***Strickland*** standard, and acknowledged that, if such circumstances were so egregiously prejudicial, ineffective assistance of counsel will be presumed. ***Cronic***, 466 U.S. at 658. One such circumstance identified by this Court as justifying a presumption of prejudice is the complete denial of counsel or the deprivation of effective representation at a critical stage of an accused's trial. See ***Cronic***, 466 U.S. at 659.

Cronic also sets forth the proposition that where there is "a breakdown in the adversarial process that implicates the Sixth Amendment [review] is not limited to counsel's performance as a whole -- specific errors and omissions may be the focus of a claim of ineffective assistance as well." ***Cronic***, 466 U.S. at 657. Trial Counsel's conduct caused such a breakdown in the adversarial system of justice in this case that the Third Circuit should have been compelled to apply the standard under ***Cronic***, rather than use the ***Strickland*** standard, requiring a showing that the outcome of a trial would have been different without counsel's errors or omissions.

Trial Counsel's admission of his client's guilt before the jury does not demonstrate mere negligence in the presentation of his case or a trial strategy to gain a favorable result that misfired. Instead, Trial Counsel's statements regarding Petitioner's guilt lessened the government's burden of persuading the jury that

Petitioner had committed the offenses with which he was charged. This conduct tainted the integrity of the trial in that, by informing the jury that Petitioner is guilty, Trial Counsel failed to "subject the prosecution's case to meaningful adversarial testing." ***Cronic***, 466 U.S. at 659.

Trial Counsel's conduct during the closing arguments cannot be considered a tactical admission, or sound trial strategy. It went well beyond that. This conduct was an entire denial of the Appellant's rights to assistance of counsel as guaranteed by the Sixth Amendment.

The Third Circuit is in conflict here with regard to which standard should apply to determine whether Petitioner received the effective assistance of counsel to which he is entitled under the Sixth Amendment. The facts and circumstances of this case indicate that the Third Circuit should have applied the ***Cronic*** exception to the ***Strickland*** test for ineffective assistance of counsel. In reaching a decision on this issue, the courts are not restricted to only the ***Strickland*** standard. ***Strickland*** must be read in conjunction with ***Cronic***. If the Third Circuit had considered both standards together, there would have been little doubt that reversal of Petitioner's conviction was warranted.

The Third Circuit, however, totally failed to address ***Cronic*** in light of ***Strickland***, and made its ruling solely on a partial application of the ***Strickland*** test. Since the Third Circuit failed to apply the appropriate law in this case, the case should be reviewed by this Court so that the Third Circuit's decision will conform to the decisions of the Supreme Court.

Petitioner respectfully urges acceptance of review by this Honorable Court, on certiorari, to consider and determine whether the district court and the Third Circuit both erred in

applying the ***Strickland*** standard rather than the ***Cronic*** standard in cases exhibiting extrinsic ineffectiveness.

CONCLUSION

Petitioner hereby respectfully moves this Honorable Court to approve his application for certiorari for the following reasons:

The Third Circuit erred in failing to apply the ***Cronic*** standard to Petitioner's ineffective assistance claim, given the extrinsic ineffectiveness in Trial Counsel's admission of Petitioner's guilt in the closing argument, which resulted in the total breakdown of the adversarial process. Additionally, in applying the ***Strickland*** standard, the Third Circuit failed to adequately review the issue by simply categorizing the acts of Trial Counsel as "defense strategy" and ignoring the prejudice that was subjected upon Petitioner given the unsuccessful nature of the tactical maneuver.

Furthermore, in cases such as this, allowing the appellate courts to pick and choose which standard is to apply, allows the disposal of merited ineffective assistance claims on a general premise, rather than a detailed inquiry into the prejudice imposed upon a defendant. Using a simple finding of "defense strategy" and foregoing any further review has the impact of making even the most egregious acts of counsel moot, under the guise of "trial strategy". This, in essence, significantly undermines the procedures enacted to ensure that a defendant's Sixth Amendment rights are protected.

Therefore, it is submitted that the Third Circuit failed to properly adhere to the standards set down by this Court and, thereby, erroneously decided that Petitioner was not denied his Sixth Amendment right to effective assistance of counsel.

Because of the lack of any inquiry as to the prejudice Trial Counsel's statements had upon Petitioner and the complete disregard for the ***Cronic*** standard, Petitioner should have been afforded, at the very least, an evidentiary hearing on this matter, and upon a finding of extrinsic ineffectiveness, to have his conviction reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3405

UNITED STATES OF AMERICA

v.

LEON SALB,

Appellant

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on May 2, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered on July 13, 1994 be and the same is hereby affirmed.

ATTEST:
P. Douglas Sisk
Clerk
May 12, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3405

UNITED STATES OF AMERICA
v.
LEON SALB,
Appellant

Appeal from the Order entered by the
United States District Court
for the Western District of Pennsylvania
Denying a Motion to Vacate Sentence
Pursuant to Title 28, United States Code, Section 2255
at Civil Action No. 94-21E, (Criminal No. 91-3E)
District Judge: Honorable Maurice B. Cohill, Jr.

Submitted Under Third Circuit LAR 34.1(a)
May 2, 1995

Before: SLOVITER, CHIEF JUDGE, ALITO and McKEE,
Circuit Judges

(Filed May 23, 1995)

MEMORANDUM OPINION OF THE COURT

McKee, Circuit Judge

Leon Salb was charged in an indictment with one count of conspiracy to distribute cocaine in violation of 21 U.S.C. §

841(a)(1) and 21 U.S.C. § 846(9). Specifically, the indictment charged that "(f)rom in or around 1978, and continuing thereafter to on or about August 1988, in the Western District of Pennsylvania and elsewhere, ...Salb did...conspire with persons known and unknown to... distribute in excess of five (5) kilograms of cocaine..." Salb pleaded not guilty and was tried before a jury in the United States District Court for the Western District of Pennsylvania.

His trial began on August 19, 1991. On August 26, 1991, the defense rested its case. Later that same day, Salb, who was free on bond, fled the jurisdiction. The jury found him guilty on the conspiracy charge.

Prior to his sentencing, Salb was apprehended and indicted on a charge of failure to appear in violation of 18 U.S.C. § 3146(a). He pleaded guilty to this charge and was sentenced as to both convictions on April 12, 1992. The district sentenced Salb to a term of imprisonment of 365 months on the conspiracy charge and to a consecutive term of imprisonment of 18 months on the failure to appear conviction.

Salb thereafter filed and appeal to this court. His judgment of sentence and conviction was affirmed by a Judgment Order. United States v. Salb, No. 92-3179 (3d Cir. December 15, 1992). On December 31, 1993, Salb filed a Motion to Vacate Judgment of Conviction and Sentence pursuant to 18 U.S.C. § 2255 with the United States District Court for the Western District of Pennsylvania. Salb's Section 2255 motion was assigned to the judge who presided over Salb's trial.

As ground for relief, he alleged, inter alai, that he was denied his constitutional right effective assistance of counsel because his counsel conceded his guilt during his closing remarks to the jury and failed to inform the district court that

he was not subject to the mandatory minimum sentencing provisions of 21 U.S.C. § 846 because the conspiracy offense had been committed prior to November 18, 1988, the effective date of the amended penalty provisions of 21 U.S.C. §846. The district court, in a Memorandum Order, rejected Salb's ineffective assistance of counsel claims and denied his 2255 motion to vacate his sentence. Salb v. United States, Civ. No. 94-21E (W.D.Pa. July 12, 1994). This appeal followed.

Salb now reasserts his claim that he was denied effective assistance of counsel because his counsel admitted his guilt during closing argument. He also argues that his sentence was illegal because the district court sentenced him under the mandatory minimum sentencing provisions of 21 U.S.C. § 841(b)(1)(A). For the reasons stated below, we reject Salb's arguments and will affirm the district court's denial of his Section 2255 motion.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

An ineffective assistance of counsel claim in a mixed question of fact and law. Thus, we are not bound by the clearly erroneous rule and we may freely review the district court's conclusion. United States v. Gray, 878 F.2d 702, 703 (3d Cir. 1989). A convicted defendants claim of ineffective assistance of counsel has two components.

> First, the defendant must show that counsel's performance was deficient. This requires that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

> Unless a defendant makes both showings, it cannot be said that the conviction...resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S.C. 668, 687 (1984). In assessing an attorney's performance, courts must be "highly deferential" and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (citing Michel v. Louisiana, 350 U.S. 91, 101 (1955)). In assessing prejudice, the question of "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695.

Here, Slab contends that his trial counsel made certain remarks which effectively told the jury that he was guilty of the drug conspiracy charge. The remarks which Slab contends demonstrate his counsel's ineffectiveness are as follows:

> I think the government put on a pretty compelling case that my client was involved in Chicago. I will admit that it looks like my client probably did it in Chicago... The absolute hardest thing in the world to do at this point in time will be to find my client not guilty... And if they want to try him in Chicago, then I presume he will probably get convicted and go to jail... Hardest thing in the world for me is to ever, in a million years, win this case.

(A74-76). Salb contends that these remarks were highly prejudicial, demonstrate a breakdown in the adversarial process

and left the jury with no choice but to convict him of the charge in the indictment. We disagree.

It was the essence of the government's case against Salb that Salb was involved in a drug conspiracy which extended from Pennsylvania to Chicago and elsewhere. However, there was little evidence of Salb's actual involvement in any transactions in Pennsylvania. The majority of the government's conspiracy case against Salb concerned drug activity in and around Chicago.

To defend his client against the government's case, Salb's trial counsel designed a strategy by which he attempted to show that the government had actually charged multiple conspiracies rather that the one conspiracy charged in the indictment. Although it is difficult to discern from the portions of the argument cited by Salb, once the ellipses are filled in and counsel's remarks cited in context, the remarks reflect the defense strategy. The complete remarks are as follows:

> In other words, if a person agrees to do one thing, that doesn't mean you agree to do the other, and both (of two government witnesses) say they never told my client anything was going on in Pennsylvania. . . .
>
> I think the government put on a pretty compelling case that my client was involved in Chicago. I will admit that it looks like my client probably did it in Chicago, but he isn't charged with that.
>
> The absolute hardest thing in the world to do at this point in time will be to find my client not guilty. But, that's what you really should do if you really look at the evidence and you really look at the law, that's what you really should do. And then if they want to try him in

> Chicago, then I presume he will probably get convicted and go to jail forever, but he didn't do it in Pennsylvania.
>
> The absolute hardest thing in the world to do at this point in time will be to find my client not guilty. And if they want to try him in Chicago, then I presume he will get convicted and go to jail forever, but he didn't do it in Pennsylvania. Hardest thing in the world for me is to ever, in a million years, win this case.

(emphasis added). As found by the district court in its opinion denying the Section 2255 motion, trial counsel's remarks asserted a common defense in cases like Salb's. That is, counsel was arguing a multiple conspiracy and his remarks about Salb's guilt in Chicago do not constitute ineffective assistance of counsel. Rather, they were part of a defense strategy aimed at attacking what counsel perceived to be the weakest part of the government's case against his client. Such tactical retreats are a part of trial strategy and od not constitute ineffective assistance of counsel. See United States v. Simone, 931 F.2d 1186 (7th Cir. 1991).

II. ILLEGAL SENTENCE

In his pro se supplemental brief, Salb contends that his sentence is illegal because the district court sentenced him under the mandatory minimum sentencing provisions of 21 U.S.C. Section 841(b)(1)(A). He notes that he was convicted of violating 21 U.S.C. Section 846, conspiring to distribute in excess of 5 kilograms of cocaine, but was not convicted of any underlying substantive offense. He cites several cases which hold that the penalty provisions of 21 U.S.C. Section 841 apply only to the substantive offense. (pro se brief at 5-10).

The government contends that this particular argument was not made in the district court in the Section 2255 motion and therefore cannot be made here. See e.g., Porcaro v. United States, 832 F.2d 208, 212 (1st Cir. 1987). The government is correct that Salb did not raise this particular argument below. He did contend that his trial counsel was ineffective for failing to inform the district court that he was not subject to the mandatory minimum sentencing provisions of 21 U.S.C. Section 841(b)(1)(A). However, he did not argue that his sentence was illegal.

In any event, Salb's argument here is of little moment because it is clear that he was sentenced under the Sentencing Guidelines and not under the penalty provisions of 21 U.S.C. Section 841(b)(1)(A). According to the record, the sentencing court found that Salb was responsible for the distribution of 99.68 kilograms of cocaine. This resulted in a base offense level of 36. It was further determined that an upward adjustment of four levels pursuant to U.S.S.G. Section 3B1.1(a) was appropriate based on Salb's role as the organizer of the conspiracy. Consequently, Salb's total offense level was 40, which called for a guideline sentence between 292 and 365 months. The sentencing court imposed a sentence of 365 months followed by a 5 year term of supervised release. (Government's Supplemental Appendix at 24).

When Salb raised the issue in his Section 2255 motion that his counsel was ineffective for failing to inform the trial court that he was not subject to the penalty provisions of 21 U.S.C. Section 841, the district court reviewed its record and held:

> After reviewing the sentencing transcript, we find that our sentence was not based upon a mandatory minimum provision of 21 U.S.C. 841...but was based upon the United States

> Sentencing Guidelines and was well within the maximum punishment prescribed. . . .

(A134). Thus, whether Salb can raise the issue of the legality of his sentence here is meaningless. The record clearly shows that he was sentenced under the Sentencing Guidelines and not the mandatory minimum sentencing provisions of 21 U.S.C. Section 841(b)(1)(A).

III. CONCLUSION

For the reasons stated above, we will affirm the judgment of the district court denying the Section 2255 motion to vacate the sentence.

TO THE CLERK:

Please file the foregoing opinion.

s/_____
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3405

UNITED STATES OF AMERICA

v.

LEON SALB,

Appellant

SUR PETITION FOR REHEARING

Present: SLOVITER, CHIEF JUDGE,
BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD,
ALITO, ROTH, LEWIS, McKEE and SAROKIN
Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/_____
Circuit Judge

Jun 13 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPEAL NO. 94-3405

UNITED STATES OF AMERICA,
Appellee,

v.

LEON SALB,
Defendant/Appellant.

APPEAL FROM A DENIAL OF A MOTION FILED PURSUANT TO 28 U.S.C. §2255 TO VACATE JUDGMENT OF CONVICTION AND SENTENCE FILED JULY 13, 1994 FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA CIVIL ACTION NO. 94-21E CRIMINAL NO. 91-3E

SUGGESTION OF REHEARING EN BANC

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STATEMENT IN SUPPORT OF SUGGESTION FOR REHEARING EN BANC

Pursuant to Third Circuit LAR 35.1, I hereby express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance, to wit:

WHETHER THERE WAS A FAILURE OF THE APPELLATE COURT TO DETERMINE THAT THE APPELLANT, LEON SALB, WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY MADE REPEATED STATEMENTS TO THE JURY AS TO APPELLANT'S GUILT WHICH PROVED HIGHLY PREJUDICIAL AND DENIED APPELLANT HIS DUE PROCESS RIGHTS.

s/ _____

MARCIA G. SHEIN
Attorney of Record for Appellant

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STATEMENT OF ISSUE

I. **THERE WAS A FAILURE OF THE APPELLATE COURT TO DETERMINE THAT THE APPELLANT, LEON SALB, WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY MADE REPEATED STATEMENTS TO THE JURY AS TO APPELLANT'S GUILT WHICH PROVED HIGHLY PREJUDICIAL AND DENIED APPELLANT HIS DUE PROCESS RIGHTS.**

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Appellant Salb was tried in the District Court for the Western District of Pennsylvania, Case No. CR-91-003-001. Salb was convicted of one count of *Conspiracy to distribute, and possession with intent to distribute more than five (5) kilograms of cocaine* in violation of 21 U.S.C. §§ 841(a)(1) and 846(9). His trial commenced on August 19, 1991. On August 26, 1991, the defense rested its case, and on the same day, the Appellant fled the jurisdiction. He was later apprehended, charged with and entered a guilty plea to *Failing to appear* in violation of 18 U.S.C. §3146(a). Appellant was sentenced for both charges on April 12, 1992, to 365 months on the conspiracy charge and a consecutive sentence of eighteen months on the failure to appear conviction. Salb filed an appeal to this Court. His judgment of conviction and sentence was affirmed by a Judgment Order on December 15, 1992.

On December 31, 1992, Appellant filed a Motion to Vacate Judgment of Conviction and Sentence pursuant to 28 U.S.C. §2255. The District Court for the Western District of Pennsylvania rejected Salb's ineffective assistance claim on July 13, 1994. Salb again appealed to this Court, which rejected Appellant's claim and affirmed the ruling of the District Court on May 12, 1995. [Attachment A].

The decision of the appellate court was erroneous in that they applied the test for ineffective assistance of counsel as set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), rather than the applicable exception defined in ***United States v. Cronic***, 466 U.S. 648 (1984).

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF ISSUE

During the closing argument at Appellant's trial, Defense Counsel made numerous prejudicial remarks to the jury essentially admitting Appellant's guilt. The relevant comments are as follows:

> *I think the government put on a pretty compelling case that my client was involved in Chicago. I will admit that it looks like my client probably did it in Chicago, but he isn't charged with that . . .*
>
> *The absolute hardest thing in the world to do at this point in time will be to find my client not guilty.*
>
> *And then if they want to try him in Chicago, then I presume he will probably get convicted and go to jail forever, but he didn't do it in Pennsylvania . . .*
>
> *Hardest thing in the world for me to do is to ever, in a million years, win this case.*

[Attachment B - Trial Transcript, pp. 63-65]

The sole purpose of closing arguments is to assist the jury in analyzing the evidence presented at trial. The remarks made by Trial Counsel were so completely outside this stated purpose that the jury was left only with the allegations of Appellant's guilt, and nothing else. No reasonable jury could have possibly, after hearing the comments by Trial Counsel, returned a verdict other than guilty.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THERE WAS A FAILURE OF THE APPELLATE COURT TO DETERMINE THAT THE APPELLANT, LEON SALB, WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY MADE REPEATED STATEMENTS TO THE JURY AS TO APPELLANT'S GUILT WHICH PROVED HIGHLY PREJUDICIAL AND DENIED APPELLANT HIS DUE PROCESS RIGHTS.

In *United States v. Cronic*, 466 U.S. 648, 658 (1984), decided on the same date as *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court created an exception to the *Strickland* standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed. *Cronic*, 466 U.S. at 658. *Cronic* presumes prejudice when there has been an actual breakdown in the adversarial process at trial. *Id.* at 659.

The Court, in *Anders v. California*, 386 U.S. 738, 743 (1967), stated that adversarial process protected by the Sixth Amendment requires that the accused have *"counsel acting in the role of an advocate." "If the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."* *Id.* at 656-57. The Court has also stated that *"due process commands that no man shall lose his liberty unless the government has borne the burden of producing the evidence and convincing the factfinder of his guilt."* *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Appellant contends that, as in this case, when a defense attorney essentially concedes the guilt of his client, the government has not been

held to its burden of persuading the jury that the defendant is guilty.

The Supreme Court recognized in ***Cronic*** that there are *"circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."* ***Cronic***, 466 U.S. at 658. The Court identified the complete denial of counsel or the deprivation of effective representation at a critical stage of an accused's trial as justifying a presumption of prejudice. ***Id.*** at 659.

The ***Strickland*** test, requiring a showing of prejudice caused by the counsel's ineffectiveness, is applicable (1) in cases where the record reflects that an attorney's errors or omissions occurred during an inept attempt to present a defense, or (2) that he or she engaged in an unsuccessful tactical maneuver that was intended to assist the defendant in obtaining a favorable ruling. ***United States v. Swanson***, 943 F.2d 1070 (9th Cir. 1991). Proof of prejudice is also required where the fundamental fairness of the challenged proceeding has not been affected and the integrity of the legal process has not been jeopardized. ***Id.*** Appellant contends that Trial Counsel's conduct caused a breakdown in the adversarial system of justice in this case that compels an application of the ***Cronic*** exception to the ***Strickland*** requirement of a showing that the outcome of a trial would have been different without counsel's errors or omissions. Trial Counsel's essential admission of his client's guilt before the jury does not demonstrate mere negligence in the presentation of his case or a trial strategy to gain a favorable result that misfired. Instead, Trial Counsel's statements regarding Appellant's guilt lessened the burden of persuading the jury that Mr. Salb had committed the offenses with which he was charged. This conduct tainted the integrity of the trial. The Court in ***Cronic*** stated that *"if counsel entirely fails to subject the prosecution's case to meaningful adversarial*

testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." ***Cronic***, 466 U.S. at 659. It is the Appellant's argument that a lawyer who informs the jury that in his view of the evidence that his client is essentially guilty has utterly failed to *"subject the prosecution's case to meaningful adversarial testing."* ***Id.*** Trial Counsel's remarks to the jury during his closing argument conveyed to the jury his belief that his client was guilty. Trial Counsel failed to function as the Government's adversary during his summation to the jury.

Actual or constructive denial of the assistance of counsel is legally presumed to result in prejudice. *See* ***Strickland***, 466 U.S. at 692. Once Mr. Salb's trial attorney essentially told the jury that in his opinion Mr. Salb was guilty of the offenses charged, he ceased to function as defense counsel. *"An effective attorney must play the role of an effective advocate, rather than a mere friend of the court."* ***Evitts v. Lucey***, 469 U.S. 387, 394 (1985). Instead of serving as his client's advocate during closing argument, Trial Counsel abandoned his client at a critical stage of the proceedings and affirmatively aided the prosecutor in his attempts to persuade the jury that there was no reasonable doubt that Mr. Salb committed the offenses with which he was charged.

Appellant cannot envision a situation more damaging to an accused than to have his own attorney essentially admit his guilt in front of the jury. Trial Counsel's conduct during the closing arguments cannot be considered a tactical admission, or sound trial strategy. It went well beyond that. This conduct was an entire denial of the Appellant's rights to assistance of counsel as guaranteed by the Sixth Amendment.

The Court is in conflict here with regard to which law should apply to determine whether Mr. Salb received the

effective assistance of counsel to which he is entitled. The Supreme Court made it clear that there were certain situations which would warrant an exception to the ***Strickland*** standard. In those cases, the Court held that ***Cronic*** was the appropriate standard to apply. The facts of the case at bar indicate that this Court should have applied the ***Cronic*** exception to the ***Strickland*** test for ineffective assistance of counsel. In reaching a decision on this issue, the Court is not restricted to ***Strickland***, but ***Strickland*** must be read in conjunction with ***Cronic***. If the Court had considered the cases together, they would have been left with little choice but to reverse Appellant's conviction. This alternative was pointed out to the Court in Appellant's Brief at p. 9 and Reply Brief at p. 8. [Attachments C and D]. The Court, however, failed to address ***Cronic*** in light of ***Strickland*** and made its ruling solely based on an application of the ***Strickland*** test. Since this Court has not applied the appropriate law in this case, the case should be reviewed en banc so that the Third Circuit's decisions in this area of the law will continue to remain consistent, and will also conform to the decisions of the Supreme Court.

CONCLUSION

WHEREFORE, Appellant requests that this petition for en banc review be granted. Furthermore, Appellant's conviction should be reversed and a new trial granted consistent with the arguments presented herein that the exception to the ineffective assistance of counsel test as defined in ***United States v. Cronic*** should have been applied, rather than the traditional ineffective assistance of counsel requirements of ***Strickland v. Washington***.

s/_____

MARCIA G. SHEIN

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CERTIFICATE OF SERVICE

I hereby certify that I have this date mailed a copy of the foregoing to the Assistant United States Attorney, Michael L. Ivory, by depositing a copy of same in the United States Postal Service with adequate postage affixed thereon to insure its delivery.

This 25th day of May, 1995.

s/_____

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LEON SALB,	)	
	)	
Petitioner,	)	
	)	CIVIL ACTION NO. 94-21E
v.	)	CRIMINAL NO. 91-3E
	)	
UNITED STATES OF AMERICA,		
	)	
Respondent.	)	

MEMORANDUM ORDER

Presently before the Court is petitioner/defendant Leon Salb's Section 2255 Motion to Vacate Judgment and Conviction of Sentence, and the government's response thereto. For the reasons stated herein, we will deny the motion.

I. Background

A criminal trial commenced before this member of the Court on August 19, 1991 in which the petitioner was charged at Criminal No. 91-3 (Erie) with one count of conspiracy to violate the federal drug laws, in violation of 21 U.S.C. Section 846. On August 21, 1991 the defense rested and sometime later that day petitioner fled from the jurisdiction. He subsequently failed to appear in court the following day, when closing arguments were heard. The case proceeded in petitioner's absence and his bond was revoked. The jury found his guilty. Petitioner was later arrested, indicted for flight at Criminal No. 91-29 (Erie) pursuant to 18 U.S.C. Section 3146(a)(1), and pled guilty to that charge on April 1, 1992.

Also on April 1, 1992, we sentenced the defendant on the conspiracy count, and attributed 99.68 kilograms of cocaine to petitioner, which resulted in a base offense level of 36 under the Sentencing Guidelines. We also upwardly departed based upon his role as an organizer or leader of the conspiracy pursuant to U.S.S.G. Section 3B1.1(a). Based upon the an adjusted offense level of 40 and a criminal history category of I, the applicable guideline range was 292 to 365 months. We sentenced his to 365 months imprisonment, with five years of supervised release.

The central thrust to petitioner's motion is one of ineffective assistance of counsel by his trial attorney, Peter Aiken, and his sentencing attorney, Alan Ross.

II. Discussion

An ineffectiveness claim arises when the representation by an attorney performance is not "reasonably effective." Strickland v. Washington, 466 U.S. 668 (1974). The Strickland court held that the Sixth Amendment to the Constitution:

> relies [] on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

Id. A convicted defendant bears the burden of overcoming the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. at 690. Petitioner must also prove that he was prejudiced by counsel's

performance -- that there is a reasonable probability that the result of the proceeding would have been different, absent counsel's unprofessional errors. Id. at 694. "An error by counsel even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691. a reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694.

We will deny petitioner's request for an evidentiary hearing on these issues as the record conclusively establishes that the petitioner is not entitles to relief sought in the petition. 28 U.S.C. Section 2255.

Petitioner alleges that he was denied effective assistance of counsel due to three deficiencies.

A. Plea Discussions

First, petitioner argues that his trial counsel improperly failed to inform his as to the existence of any plea discussions with the government. Under Strickland, an attorney's conduct is said to be incompetent when the plea offer is never communicated to a client, or when plea information is so incorrect and insufficient that it undermines the ability of the client to make an intelligent decision whether to accept the offer. United States v. Barber, 808 F. Supp. 361 (D. N.J. 1992).

Petitioner has submitted letters and affidavits written by the federal prosecutor, Ernest Disantis, his trial counsel, Peter Aiken, and his appellate counsel, Alan Ross. We find that there is no evidence of plea offer from the United States Attorney's Office, and that petitioner was advised by his counsel prior to trial that his cooperation could warrant a lesser

sentence, and petitioner was not interested. Petitioner's lawyer summarizes his recollection of the events:

> it is my recollection that it was the position of the Assistant United States Attorney that the only plea offer was to plead open [sic] to the count. The prosecutor, Mr. DiSantis, was an extremely competent assistant United States Attorney. It was his prosecutorial philosophy to get convictions on people and then, after they were hammered with stiff sentences, to approach them with respect to cooperation. If you look at the history of the predecessor cases, that is the cases of all of the individuals who testified against Leon, that is exactly what he did. Many of those individuals were tried and convicted. After their conviction and after they were facing extremely long jail sentences, their cooperation was solicited. In short. . . .there was no offer on the front end.
>
> Throughout the entire case, I literally begged Leon to give consideration to substantial assistance. . . .

Pet.'s Attach. B (emphasis added). The federal prosecutor recalls:

> I believe that Mr. Aiken and I had a very general conversation well in advance of trial. I don't believe the conversations were any more specific than my advising his that, if there was any willingness to plead, we should have those discussions well in advance of the trial date before the government had to commit its time and efforts in fully preparing the for trial.

> In short, any conversations that I had with Mr. Aiken prior to trial were extremely brief and superficial, at best.

Pet.'s Attach. A (emphasis added).

Petitioner submitted a sworn affidavit in which he states that he had no knowledge of any plea discussions until after the conviction. Pet's Attach. D. He also states, "[p]rior to trial Mr. Aiken asked me if I wanted to cooperate with the government. I felt at the time that I had no information that could help them." Pet's Attach. D.

We find that counsel was not ineffective because there was no plea offer to be communicated. We find the recollections of the prosecutor and the trial lawyer to be highly credible and consistent with out memory of the case. Moreover, the only mention of a possible plea from the government was mentioned to petitioner's counsel in an extremely vague, routine manner. We do not see how this could be interpreted as a sound offer of a plea, and certainly, Mr. Aiken did not act unreasonable in failing to mention it. Petitioner had not shown that his attorney failed to communicate information to him sufficient to override the presumption of effectiveness under Strickland. Moreover, even assuming that petitioner has not shown that he was prejudiced by the alleged ineffectiveness because he admits in his affidavit that he was unwilling to cooperate.

We therefore will deny petitioner's motion to vacate his conviction and sentence on this ground.

B. Prejudicial Statements

Second, Petitioner alleges that his counsel made repeated statements to the jury during closing argument as to the guilt of

petitioner which proved highly prejudicial and therefore denied petitioner his due process rights.

We will deny his Section 2255 motion on this ground as well, noting the strong and unenviable impact of petitioner's absence from the courtroom on the content of counsel's closing argument. What petitioner regards as "throwing in the towel" was actually a futile attempt to negate the impact of petitioner's flight, and to argue a rather common defense in these cases, that the government had charged two conspiracies, rather than one. We believe that these factors led Mr. Aiken to state the following which, as quoted by petitioner out of context, could be interpreted as a breakdown in a adversarial process:

> I think the government put on a pretty compelling case that my client was involved in Chicago. I will admit that it looks like my client probably did it in Chicago. . . . The absolute hardest thing in the world to do at this point in time will be to find my client not guilty. . . . And if they want to try him in Chicago, then I presume he will probably get convicted and go to jail forever, . . . Hardest thing in the world for me to do is to ever, in a million years, win this case.

Tr. at 63-65. Petitioner, however, fails to quote other important portions of the closing argument, as underlined below:

> if a person agrees to do one thing, that doesn't mean you agree to do the other, and [two witnesses] say they never ever told my client anything was going on in Pennsylvania. . . . [I]t looks like my client probably did it in Chicago,<u>but he isn't charged with that</u>. . . . The absolute hardest thing in the world to do at this point in time will be to find my client not guilty. <u>But, that what</u>

> you really should do if you really look at the evidence and you really look at the law, that's what you really should do. And if they want to try him in Chicago, then I presume he will probably get convicted and go to jail forever, but he didn't do it in Pennsylvania.

Tr. 63-64. Mr. Aiken provided the best legal counsel available under the circumstances by attacking the credibility of indicted and unindicted co-conspirators and by arguing a multiple conspiracy:

> This is the first time in twenty years I have ever had to argue a case to a jury without my client being here. There are two conclusions you can reach. One of them is that he's guilty as sin, he's scared to death and he bogied and left. That is what the prosecutor is going to argue to you, and that's a consciousness [sic] acknowledgement of guilt. The other one is that he sat here for a week, watched the government make deals with unconscionable people, sat here and watched them lie, sat here and watched them put him into things that he wasn't in, and he figured he was being railroaded. I'll never know what went through my client's mind. I wish he was here because I got a little more faith in the jury system than he does. I think he probably lost faith. I don't blame him when you see what the government did with some of these witnesses and you see what they are saying. But, that's not for us to decide. What is for us to decide is whether or not it was one conspiracy or several conspiracies.

Tr. at 62. We find, based on the entire record of the case and a close examination of the entire closing argument of defense counsel, that the petitioner has not met his burden of showing

that trial counsel chose an unreasonable course of conduct. We therefore will deny his motion on this ground.

C. Mandatory Minimum Provisions

Third, petitioner alleges that his counsel failed to bring to our attention a violation of ex post facto laws in that he should not have been subject to the mandatory minimum provisions upon his conviction of a conspiracy offense under 21 U.S.C. Section 846 where the entire offense was committed prior to November 18, 1988.

After reviewing the sentencing transcript, we find that our sentence was not based upon a mandatory minimum provision of 21 U.S.C. Section 841(b)(1)(ii), but was based upon the United States Sentencing Guidelines and was well within the maximum punishment prescribed, life imprisonment.

Therefore, there was no violation of the ex post facto law, and we will deny petitioner's motion.

AND NOW, to-wit, this 13th day of July, 1994, it is hereby ORDERED, ADJUDGED and DECREED that petitioner's Section 2255 Motion to Vacate Judgement of Conviction and Sentence (Doc. 59) be and the same hereby is DENIED.

s/_____
Maurice B. Cohill, Jr.
Judge

cc: Marcia G. Shein, Esq.
710 Lake View Avenue, NE
Atlanta, GA 30308

Ernest J. DiSantis, Jr.
Asst. United States Attorney
United States District Court
Erie, PA 16501

you all are going to say, who cares, let's convict him. But, you got to look at what they charged him with in this case. They have alleged that he did something here. A conspiracy, unlike any other crime, involves an agreement; you have to agree to do it. You have to agree to do it. You have to know about it.

In other words, before I can agree to rob the First National Bank in Erie, Pennsylvania, I have to know that that is an act that's reasonably contemplated by the guys that I am working with, as opposed to just an agreement to do something.

The government would like to have you believe -- and I keep going back to this bank robbery analogy, but that seems to be the best one -- well, if you agree to rob banks, that's -- you're a bank robber, and no matter where you rob them, you are all part of one big master conspiracy, but that's not what agreements are.

In other words, if a person agrees to do one thing, that doesn't mean you agree to do the other, and both Slosses say they never ever told my client anything was going on in Pennsylvania. When they were down there in '84, they were all small-time dealers at that time. They all went on to get themselves in a terrible mess up here.

I think the government put on a pretty compelling case that my client was involved in Chicago. I will admit that it looks like my client probably did it in Chicago, but he isn't charged with that.

Under the government's theory, he is, because they are saying, will, this is all one master conspiracy. It cannot possible be. Every witness said otherwise.

The charts are beautiful. The arrows are nice, but that is not what the witnesses said. They have said it was a different, separate thing.

Here's another instruction that the Court will give you, and you got to listen to them all and I am not supposed to emphasize none of them. There is one of them that says, the question is never, will the government win or lose? Because this isn't some kind of contest here. It's not, will the government win or lose the case? The government always wins if justice is done, regardless of the verdict, guilty or not guilty.

The absolute hardest thing in the world to do at this point in time will be to find my client not guilty. But, that's what you really should do if you really look at the evidence and you really look at the law, that's what you really should do. And then if they want to try him in Chicago, then I presume he will probably get convicted and go to jail forever, but he didn't do it in Pennsylvania.

The prosecutor says I am not at a disadvantage. I feel like General Custer. Every time I shoot down one of their indians, every time that I prove to you that he is a liar and not believable, up comes over the hill another indian, and I got barraged by about ten indians and I don't have a way to create indians because I don't have an ability to create deals.

So, your job is real simple. And it's either one conspiracy or it wasn't, and it's got to be one conspiracy beyond a reasonable doubt. Hardest thing in the world for me to do is to ever, in a million years, win this case.

I'm asking you to return a verdict -- you know, that's another thing. The verdict form, it says guilty and not guilty. I would like some other choices. I would like, not guilty here, because that is the box you really should pick; you know, or guilty somewhere else, or guilty or something else.

But, there is only two choices. And if you have